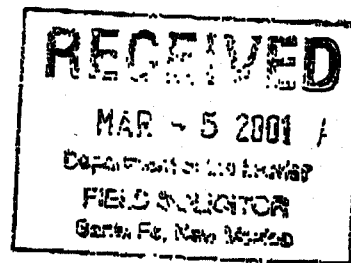


Mr. Andrew Smith, Esq.
Mr. John Zavitz, Esq.
United States Attorney's Office
United States Department of Justice
Box 607
Albuquerque, NM 87103-0607

Mr. Darrell R. Riekenberg, Esq.
United States Army Corps of Engineers
Office of the Counsel
4101 Jefferson Plaza, NE
Albuquerque, NM 87109



Ms. Martha Franks, Esq.
Mr. Dale Pontius, Esq.
Mr. Michael Schoessler, Esq.
United States Office of the Solicitor
Box 1042
Santa Fe, NM 87501

Re: *Minnow v. Martinez*, Settlement Proposal; Reasonable and Prudent Alternative

Dear counsel:

Please consider this letter and the attached outline of a proposed reasonable and prudent alternative (RPA) as an offer to resolve the dispute in the *Minnow v. Martinez* lawsuit. We base our proposal on what we consider to be a fundamental reality concerning the Rio Grande today: that irrespective of the perceived benefit to the Rio Grande Silvery Minnow, it is simply not feasible to maintain continuous flows on the river indefinitely and under all circumstances. Furthermore, we believe that it is in our mutual interest – as well as in the interests of the minnow – that we address this fundamental reality. We base our proposal on our belief that it is better we devote our human and financial resources towards saving the species and bettering the river rather than towards protracted and uncertain litigation.

To summarize our proposal, the State will make available for the benefit of the Rio Grande Silvery Minnow, through sale or lease, a portion of its Rio Grande Compact Accumulated Credit Water now stored in Elephant Butte Reservoir, by moving that water into upstream storage in Abiquiu and Cochiti reservoirs through exchange and thereby establishing an endangered species conservation pool. The water would be stored only at times when native flows exceed downstream demands and would be available at a price to be agreed upon in the future. The total amount of water stored will not exceed 100,000 acre-feet, depending on flows, and the amount available for release in any given year will not exceed 30,000 acre-feet, with the remainder available to offset additional depletions, such as evaporative losses. The term of this agreement will be three years (the time required, we believe, to institute a long-term solution to this problem) and is contingent upon the parties obtaining whatever consent and approvals,

whether from the Rio Grande Compact Commission, the Corps of Engineers, the City of Albuquerque, and/or any other entities, may be required.

The New Mexico Interstate Stream Commission believes this quantity of water is adequate to (1) maintain flows of 100 cfs over Isleta Diversion Dam with up to 50 cfs continuing over San Acacia (which we calculate will keep the river wet throughout the year south at least to Escondida, even in an abnormally dry year such as last year), (2) offset depletions resulting from pumping from the Low Flow Conveyance Channel to the river (which in a dry year such as last will keep fifteen miles of the river from Elmendorf drain outfall south to the Corral area wet), and (3) offset depletions resulting from the pumping from selected wells to keep selected portions critical for minnow survival wet (presumably, within the Escondida to Bosque del Apache reach of the Rio Grande). This quantity is not sufficient to maintain a continuous, non-intermittent river, a condition which we do not believe is hydrologically feasible barring an extraordinarily wet year.

In addition, the State will agree that the proceeds it will receive for this water will be used for programs intended to benefit the minnow. Today various agencies have, in various aquarium facilities throughout the country, the capacity to hold 40,000 adult Silvery Minnow, a number adequate to assure sufficient genetic diversity so that the species remains viable. We propose that the various agencies collect fish from areas subject to drying and move them to these aquaria. The State will agree to seek funding for expansion of these existing aquaria and to design and construct naturalized refugia for the minnow (operating under the direction of the Service). The State will cooperate and assist in collecting, translocating and monitoring populations of the minnow so that their loss will be minimized, and so that their reintroduction into the wild will be assured and facilitated, and we will assist in the restoration of habitat where appropriate. Lastly, the State Engineer will seek to ensure that the diversions of the Middle Rio Grande Conservancy District are sufficient but not wasteful: contingent, of course, upon the appropriate federal agencies providing his office with the reasonable demands of the Pueblos within the District to aid him in making that determination.

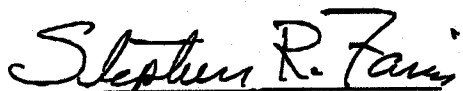
In making this proposal, we assume that a Biological Opinion will be issued finding jeopardy and determining that there is a biological basis for reasonable and prudent alternatives which do not mandate continuous flows of the Rio Grande. We also assume that the Incidental Take Statement associated with that Biological Opinion will authorize incidental take by federal and non-federal agencies and water users. Obviously, if these assumptions are incorrect, then we would be unable to pursue this proposal. Finally, this letter represents only a summary of our submission; there are many details that would need to be clarified in a final settlement document.

If this proposal is acceptable, the State of New Mexico in turn will require that the government comply with all permitting and depletion offset requirements as determined by the State Engineer or the Interstate Stream Commission, and that it will negotiate in good faith regarding the payments made for our Compact water, which represents our only insurance against inevitable future Compact delivery shortfalls.

We believe the State has made extraordinary efforts to resolve the dispute between us in a way that acknowledges both of our legitimate concerns. Frankly, we are uncertain if we can proceed very far beyond what we are proposing but we welcome alternative suggestions. While we would ask that these matters be kept confidential until a final decision is made as to whether we should proceed as outlined, in the event such decision is declined or deferred, we request that this proposal and the attached RPA outline be included in the administrative record.

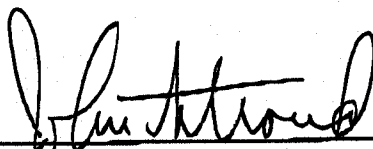
Your kind attention and a prompt response is appreciated.

Sincerely,



Stephen R. Farris
Assistant Attorney General
Counsel for the State of New Mexico
ex rel. Attorney General

P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6939



John Stroud
Special Assistant Attorney General
Counsel for the State of New Mexico
ex rel. Office of the State Engineer
ex rel. Interstate Stream Commission

P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150

**OUTLINE OF
REASONABLE AND PRUDENT ALTERNATIVE
FOR IMPACTS TO RIO GRANDE LISTED SPECIES
RESULTING FROM THE DIVERSION, DEPLETION, AND USE OF WATER
IN THE MIDDLE RIO GRANDE AND RIVER OPERATIONS AND CHANNEL
MAINTENANCE ACTIVITIES**

- I.** **Scope:** Federal discretionary actions by the Bureau of Reclamation (BOR), the U.S. Army Corps of Engineers (COE), and the U.S. Fish and Wildlife Service (FWS) relating to any diversion, storage, depletion, or use of water in the Middle Rio Grande drainage, or to activities in the channel of the Middle Rio Grande River related to river operations and channel maintenance.
- II.** **Term:** An interim period of three years, which is the minimum time required to identify and implement longer-term solutions.
- III.** **Assumptions:** Under the ESA, reasonable and prudent alternatives are only relevant if the proposed federal actions would result in jeopardy to listed species or adverse effects to designated critical habitat. This Outline assumes that a biological opinion related to the scope identified above would reach a jeopardy conclusion, and that there is an adequate biological basis for the acceptance of RPA's which do not guarantee continuous flows through the Middle Rio Grande under all circumstances. This Outline also assumes that it is not necessary to identify the exact limits of federal discretionary authority with respect to activities within the above-described scope, and that the Incidental Take Statement associated with the Opinion will authorize incidental take by federal and nonfederal agencies and all water users governed by State law. Finally, although the potential combinations of future physical and biological conditions are theoretically infinite, the Biological Opinion will address a range of water supply conditions which span the range from reasonably foreseeable wet conditions to reasonably foreseeable dry conditions based on recorded hydrologic conditions in the Middle Rio Grande and the San Juan Basin.
- IV.** **Proposed RPA**
- A. Actions of the State of New Mexico:**
1. **Sale of Rio Grande Accumulated Compact Credit Water:** The State will make available to the federal action agencies, at a mutually-agreed price, up to 100,000 acre feet of the State's Rio Grande Compact Accumulated Credit Water (hereafter "Credit Water"), of which a maximum of 30,000 acre-feet will be made available in any one year. Credit Water is water stored in Elephant Butte Reservoir in excess of the

quantity required to be delivered according to the terms of the Rio Grande Compact. Credit Water will be made available either for release from the endangered species Conservation Pool established upstream (see paragraph IV.A.3 below) or for direct offset of increased depletions resulting from water and river management related actions by federal agencies where there is no impairment of water users between the depletion site and Elephant Butte Reservoir, and shall only be used in the manner described in paragraph IV.A.4 below. The difference between the total of 100,000 and the amount available for use in any one year will be retained by New Mexico for evaporation and shrink.

2. **Credit Water for Habitat Restoration:** The State also will make available to the federal action agencies, at a mutually-agreed price and in addition to the Credit Water made available in paragraph IV.A.1. above, up to 1,000 acre feet of Credit Water per year which may only be used to offset increased depletions resulting from habitat restoration activities which are primarily intended to benefit the RGSM.
3. **Conservation Pool:** The State of New Mexico, acting through the Interstate Stream Commission, will establish a Conservation Pool for endangered species purposes in storage reservoirs upstream of Elephant Butte Reservoir, filled with up to 100,000 acre-feet of Credit Water, by exchange. Because Credit Water will only be stored to the extent that flows are in excess of all other demands downstream from the storage point to Elephant Butte Reservoir, including the storage of water and direct diversion and use of water at the time of storage, the fill rate of the Conservation Pool will depend on runoff conditions. Establishment of this Conservation Pool is contingent upon the State obtaining all necessary approvals from the Rio Grande Compact Commission, COE, and any other entity whose consent may be legally required. The State will retain title to and control over water in the Conservation Pool in excess of the 30,000 acre-feet of water which is made available to federal action agencies in any one year as a part of this RPA.

Provided that the fill rate is sufficient, the State will make available to the federal action agencies, at a mutually-agreed price, up to 30,000 acre-feet of Credit Water per calendar year during the term of this RPA. This water will be available for use by these agencies for any of the purposes listed in paragraph IV.A.4. below.

4. **Purpose of Use of Credit Water.** Credit Water will be made available by the State to the federal action agencies for the following purposes only:

- a. To comply with the conditions of permits issued by the New Mexico Office of State Engineer for the pumping of water from the Low-flow Conveyance Channel into the Rio Grande regarding the offset of additional depletions resulting from the operation of such pumps;
 - b. To comply with the requirements of permits issued by the New Mexico Office of State Engineer for the pumping of water from existing or new wells or from other activities for the benefit of the RGSM regarding the offset of additional depletions resulting from such pumping or activities;
 - c. To release to the Rio Grande for beneficial uses, including maintenance of aquatic and riverine habitat, occurring in the Rio Grande between two specified locations pursuant to a permit issued by the New Mexico Office of the State Engineer;
 - d. To repay the Middle Rio Grande Conservancy District (MRGCD) or other water users for water provided by such entities for the benefit of the RGSM.
 5. The New Mexico Interstate Stream Commission will take the lead on non-federal actions relating to the relocation of the San Marcial railroad bridge, including providing a substantial portion of the non-federal funding.
 6. The New Mexico Interstate Stream Commission will continue its support of and participation in the Middle Rio Grande Endangered Species Act Workgroup (ESA Workgroup), which it convened and has funded to date. State matching funding for activities to implement the Rio Grande Silvery Minnow Recovery Plan and other activities identified in the ESA Workgroup cooperative program document (January 2001) will be provided through the NMISC.
- B. Actions of the Fish & Wildlife Service.** FWS shall plan, request, and direct the quantity and timing of all releases of Conservation Pool water, in cooperation with other federal action agencies to the maximum extent possible.
- C. Actions of the Bureau of Reclamation and Corps of Engineers.**
1. **Lease of Conservation Pool Water.** At the request of FWS, BOR and the COE will release Credit Water made available to federal agencies by the State of New Mexico from the Conservation Pool for the benefit of the RGSM.

2. **Other Beneficial Actions.** In cooperation with the State, City of Albuquerque, and FWS, will develop and implement a plan for the use of captive breeding facilities, including use of the State's Santa Rosa hatchery and the naturalized refugia being designed and constructed at the Albuquerque Aquarium.

D. Joint Actions of Federal Agencies.

1. **Lease of Water.** BOR, COE, and FWS will, to the extent authorized by law, cooperate to accomplish the purchase or lease of Credit Water made available to them by the State of New Mexico under this RPA.
2. **Spawning Flow.** All federal agencies will cooperate as required in order to ensure that the Credit Water made available by the State of New Mexico under this RPA is available for use to provide a spawning flow for the RGSM.

A review of available literature suggests that RGSM spawning activities are triggered by increasing or peaked hydrographs from March to September. However, most of the literature suggests the bulk of the spawning activities occur between May and June. Spawning is generally thought to occur in low velocity habitats over silt or sand substrates coinciding with hydrograph peaks. However, there is some evidence that peak flows are not necessary for RGSM spawning. During most years, flows over San Acacia are sufficient to trigger spawning activities in RGSM. However, in dry years supplemental water may be necessary to cue spawning activities.

Average discharges were determined for years 1992-1999 and used to establish trends between dry years and wet or average years. All of the following assumptions are based on 30,000 acre-feet (approximately 1.3 billion cubic-feet) available for supplemental flows.

Wet or average water years – Mean discharges at the San Acacia gage in wet or average years should be sufficient to initiate spawning activities without any supplementation. Generally, flows in wet or average years are above 1000 cfs for much of May and June. In this case, it may be more beneficial to use the 30,000 acre-feet of water to supplement flows after spring runoff.

Dry water years – During dry water years, discharges are often

measured below 500 cfs and sometimes as low as 50 cfs during May and June spawning periods. Considering that small peaks in the hydrograph may initiate spawning, flows ranging from 250-500 cfs over San Acacia Dam may be adequate in dry years. The literature suggests that individual RGSM spawn at different intervals throughout the spawning season. For this reason, rather than using all available water for one large peak flow, several, well timed small peak flows may be more appropriate. However, suggestions that peak flows are not necessary for RGSM spawning suggest that eliminating hydrograph peaks and keeping the channel wet for a longer period may be adequate for producing a spawning event better for long-term survival of the minnow. Regardless of whether or not peak flows are used in dry years, salvage of RGSM from drying reaches would be required.

3. **Optimization of Releases of Conservation Pool Water.** FWS, COE, and BOR will schedule, to the maximum extent possible, schedule releases of Credit Water so as to provide to Cochiti Pueblo the maximum benefits associated with the storage of Credit Water in Cochiti Reservoir.

V. **Emergency Preservation Plan and Facilities:** The State, FWS, BOR and COE, in cooperation with non-federal participants, shall ensure that adequate resources and capacity are available to capture and protect sufficient RGSM in aquaria in the event of river-drying or other conditions which may result in the loss of RGSM which are capable of reproduction until such time that they can be returned to the to the Middle Rio Grande. The use of such facilities shall be at the direction of FWS, with the expectation that this Plan will be implemented at such times as non-continuous flows or river drying make salvage and relocation of RGSM necessary to minimize mortality. Preservation or salvage of RGSM populations at risk of increased mortality due to channel dewatering may be accomplished in conjunction with monitoring efforts. Any RGSM captured would be carefully handled and transported to appropriate rearing facilities or naturalized refugia under FWS direction. Additional efforts outside the scope of monitoring efforts may be necessary to preserve as many individuals as possible. This could be accomplished with widespread seining in drying reaches of the river. Any fish captured would be immediately transported to hatchery facilities in coordination with FWS and NMDGF (Santa Rosa). FWS will cooperate with the State and other appropriate parties in making additional efforts to preserve as many individuals as possible.

VI. Joint Actions of Federal and State Agencies.

- A. **Monitoring:** All water years – During all water years, monitoring of RGSM populations in the San Acacia reach is necessary. Seasonal and annual population

estimates of RGSM will provide a baseline for determining the efficacy of future recovery activities, as well as an assessment of extinction risk for the species. Several management actions are currently being proposed to assist in recovery of the RGSM including habitat restoration in the Rio Grande, off-channel propagation and rearing in hatchery systems, propagation and rearing in a naturalized refugia, and a review and Environmental Impact Statement on federal operations in the Rio Grande. However, existing RGSM monitoring programs are not sufficiently sensitive to evaluate population numbers. In dry years, monitoring efforts could serve as a means of salvaging RGSM in drying reaches of the river to reduce mortality rates.

- B. Naturalized and other Refugia.** Naturalized Refugia. The federal and state parties, in cooperation with the City of Albuquerque (COA), will develop and implement a plan for the use of captive breeding facilities, including use of the State's Santa Rosa hatchery and the naturalized refugia being designed and constructed at the Albuquerque Aquarium.
- C. ESA Workgroup Activities.** The federal and state parties, in cooperation with representatives of environmental and business advocacy groups, will support the ESA Workgroup in its implementation of the collaborative agreement now in the process of final review.
- D. Section 7 Consultations.** Federal action agencies and the FWS will include the State through the New Mexico Interstate Stream Commission in Section 7 consultations that pertain to water operations and conveyance, to issues relevant to the Rio Grande Compact, and to water depletions in the Middle Rio Grande.